STATE OF WASHINGTON
DEPARTMENT OF HEALTH
DIVISION OF ENVIRONMENTAL HEALTH
PO Box 47820 • Olympia, Washington 98504-7820

August 19, 2005

TO: Dr. Thorburn, Chair
State Board of Health

FROM: Janice Adair, Assistant Secretary
Division of Environmental Health

SUBJECT: Request for emergency rule making and rule delegation for
WAC 246-272A-0130 – On-site Sewage Systems Bacteriological Reduction

WAC 246-272A-0130 was adopted by the State Board of Health in July as part of chapter 246-272A WAC, On-site Sewage Systems. This section of the on-site sewage system rules specifies the protocol needed to demonstrate that a proprietary treatment product (companies with patented devices) meets the fecal coliform standards established in the chapter. Manufacturers must use this protocol as part of the process to register their product. The primary entity for performing this testing is the National Sanitation Foundation (NSF). During the course of the recent rule making, Wastewater Management Program staff worked closely with representatives of the NSF and developed language to meet their recommendations. However, new information from manufacturers undergoing product testing at NSF testing facilities indicates the protocol specified in the rule is overly burdensome and cannot meet the standard methodology for securing accurate results.

In order to assure that performance testing results accurately verify a product's treatment capability in the most cost effective way, I am requesting the Board take two actions:

- Adopt an emergency rule to immediately create an appropriate protocol. The existing protocol is scheduled to become effective on September 15, 2005. An emergency rule will replace this rule, substituting a suitable protocol for manufacturers to use as they begin the testing process.
- Delegate rule making to DOH for a permanent correction to this section. Since an emergency rule is only effective for 120 days, a permanent rule must be adopted. Because of the limited time-frame, it will be more expeditious for DOH to adopt the permanent version of this section. This meets the Board's policy for delegation to DOH. It will not change the substance of the rule, it is not a policy change, and there is a very narrow group of interested parties.

We have received guidance from DOH Assistant Attorney General Dori Jaffe that this issue meets criteria in RCW 34.05.050 for emergency rule adoption. This statute states that "if an agency for good cause finds that immediate adoption, amendment, or repeal of a rule is necessary for the preservation of the public health, safety, or general welfare, and that observing the time requirements of notice and opportunity to comment upon adoption of a permanent rule would be contract to the public interest…the agency may dispense with those requirements and adopt, amend or repeal the rule on an emergency bases." AAG Jaffe found that the proposed amendment meets the test for an emergency rule in that:

- The adopted testing protocol:
    - Is not consistent with the capabilities of some of the laboratories who would perform the testing due to the inability to have samples analyzed within the maximum holding times specified by Standard Methods;
    - Could result in a decreased level of accuracy and reliability, potentially leading to public health concerns if products were installed whose testing results were incorrect;
    - Could lead to an increased potential of sample contamination due to a greater than needed number of samples and the samples being handled more frequently;
- Despite DOH actions to inform manufacturers and potential testing entities of the error and upcoming changes to the rules to rectify the error, manufacturers may have their product tested to the adopted protocol, possibly necessitating expensive retesting.
- DOH discussion with both manufacturers and technical representatives of the primary testing laboratory (the sources for the adopted language) concluded that the adopted protocol provides less assurance of accuracy and reliability at an increased cost to the manufacturer.

Thus, even though this is not a public health emergency, it meets the standard in RCW 34.05.350 for adopting an emergency rule as there are inherent risks in allowing the protocol to go into effect on September 15, 2005. Mainly, the protocol is not consistent with NSF protocols, accurate data will not be presented to the department for product registration, and manufacturers will be forced to unnecessarily spend time and money. An emergency rule will ensure that there is no delay in ensuring adequate bacteriological reduction.

I believe it is important to have an accurate, useable protocol in place before manufacturers begin testing their products to avoid the possibility that a manufacturer would begin using an incorrect protocol. If you have any questions, please contact me at (360) 236-3002 or Maryanne Guichard at (360) 236-3391. Thank you for your attention to this issue.

cc: State Board of Health Members